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No. 93-1400 and 93-1420

In the Supreme Court of the United States

OCTOBER TERM, 1993

JOHN GOTTI, PETITIONER

v.

UNITED STATES OF AMERICA

FRANK LOCASCIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the jury was properly instructed on the "pattern of racketeering" element of RICO.

2. Whether a single, promptly stricken remark in the prosecutor's closing argument required reversal of the convictions.

3. Whether the district court committed plain error in instructing the jury under 18 U.S.C. 1959(a) on the element that a murder be committed "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity."

4. Whether the government sufficiently proved, and the jury was properly instructed regarding, petitioner Locascio's knowing and willful participation in the alleged conspiracies.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-56a)[1] is reported at 6 F.3d 924.

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[1] "Pet. App." refers to the petition appendix in No. 93-1400.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1993. A petition for rehearing was denied on December 7, 1993. Pet. App. 59a-60a. The petitions for a writ of certiorari were filed on March 7, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of substantive and conspiracy violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 U.S.C. 1962(c) and (d)) (Counts 1 and 2). In addition, petitioners were convicted of conspiring to murder, and murdering, Louis DiBono (18 U.S.C. 1959(a)(1) and (5)) (Counts 7 and 8); of conspiring to murder Gaetano "Corky" Vastola (18 U.S.C. 1959(a)(5) (Count 9); of conspiring to obstruct grand jury investigations (18 U.S.C. 371) (Count 11); and of conspiring to defraud the United States in the ascertainment, computation and collection of income taxes (18 U.S.C. 371) (Count 13). Petitioner Gotti was also convicted of conspiring to murder, and murdering, Robert DiBernardo and Liborio "Louie" Milito (formerly 18 U.S.C. 1952B(a)(1) and (5) (Supp. IV 1986) (Counts 3-4 and 5-6); of conducting an illegal gambling business (18 U.S.C. 1955) (Count 10); and of obstructing justice (18 U.S.C. 1512) (Count 12).

The district court sentenced petitioners to life imprisonment on the RICO and certain murder counts, to run concurrently with lesser terms of imprisonment on the remaining counts. Each petitioner was also ordered to pay a total fine of $250,000, as well as $650 (Gotti) and $350 (Locascio) in special assessments. Pet. App. 6a. The court of appeals affirmed. *Id.* at 1a-56a.

1. Petitioner Gotti was the boss, and petitioner Locascio the acting underboss, of the Gambino Family of La Cosa Nostra. The trial evidence included tape recordings of petitioners' lawfully intercepted conversations at several locations, most significantly an apartment two stories above the Ravenite Social Club that served as the Gambino Family's headquarters. Petitioners' conversations in that apartment encompassed discussion of whom they had murdered and why; how to exert the Family's control over various New York City industries and unions; and how to obstruct law enforcement investigations of the Family. Salvatore Gravano, a Gambino Family "consigliere" who participated in many recorded conversations and was indicted with petitioners, also testified after entering a cooperation agreement with the government shortly before trial. The court of appeals described the tape-recorded conversations as "damaging for [petitioners]" and Gravano's testimony as "especially damaging." Pet. App. 4a-6a. See generally Gov't C.A. Br. 3-36 (detailed description of trial evidence).

2. The court of appeals affirmed petitioners' convictions.[2] Pet. App. 1a-56a.

a. The court of appeals held that the district court properly instructed the jury regarding RICO's "pattern" element. Pet. App. 36a-38a. It explained that RICO "requires that defendants commit at least two acts of racketeering that: (1) are related, and (2) amount

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[2] The court rejected several claims that petitioners do not renew in this Court. *E.g.*, Pet. App. 7a-19a (disqualification of defense attorneys who had served as "house counsel" and had first-hand knowledge of events presented at trial); *id.* at 19a-28a (expert testimony regarding the structure of organized crime families); *id.* at 45a-46a (sequestration of anonymous jury); *id.* at 47a-48a (severance of defendants and other challenges); *id.* at 48a-53a (denial of new trial motion).

to or pose a threat of continued criminal activity." *Id.* at 36a (citing *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989)). The court did not take issue with Gotti's assertion that some "other circuits require that the racketeering acts further the affairs of the enterprise, not just relate to the enterprise." Pet. App. 37a (citations omitted). Nonetheless, the court relied on Second Circuit precedent that "does not impose such an 'in the furtherance of' requirement" but instead allows "the relatedness requirement [to] be satisfied by proof that: (1) the defendant was enabled to commit the offense solely by virtue of his position in the enterprise; or (2) the offense was related to the activities of the enterprise." *Ibid.* (citations omitted). It concluded that the district court's instructions were correct because "under the law of this Circuit, it is not determinative that the defendant committed the crime to further his own agenda, if indeed he was only able to commit the crime by virtue of his position within the enterprise." *Ibid.*[3]

b. The court of appeals held that petitioners were not entitled to a new trial based on a remark in the prosecutor's closing argument. Pet. App. 43a-45a. That remark, which was promptly interrupted and stricken by the district court, advised the jury that: "If you accept the proof of what you are dealing with here, the boss of a murderous and treacherous crime family and his underboss, you

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[3] In a similar vein, the court rejected Gotti's argument that the district court erred by failing to instruct that "the predicate racketeering acts must be related both to each other and to the enterprise." Pet. App. 37a. It explained, to the contrary, that "the relatedness requirement is satisfied even if the predicate acts are not *directly* related to each other so long as both acts are related to the RICO enterprise in such a way that they become *indirectly* connected to each other." *Ibid.*

would be less than human, if you didn't feel some personal concern—" (*id.* at 43a-44a). The court of appeals condemned that remark as "totally inappropriate" (*id.* at 44a) and indeed "indefensible" (*id.* at 45a). Nonetheless, it concluded that reversal was not warranted:

> Although the statement potentially caused jurors to question their own safety, the fact that the district court immediately struck the remark mitigates the possible prejudice. The transcript shows that the prosecutor immediately moved on to other areas, and it is likely that the jury did not even take notice of the intent and meaning of the safety reference. Most importantly, in view of all the evidence in this case, the likelihood that the remark had anything to do with the convictions is nonexistent. As noted earlier, the jury did not robotically vote to convict [petitioners] on all charges, acquitting Locascio on one count. This indicates that the jury does not appear to have been influenced to deviate from its sworn duties. The conduct, therefore, was harmless.

Id. at 45a (citation omitted).

c. The court of appeals held that the district court had not committed plain error in instructing the jury on the murder and murder conspiracy counts under 18 U.S.C. 1959. Pet. App. 28a-35a. Section 1959 requires proof that the murder was committed "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity." *Id.* at 28a-29a (quoting 18 U.S.C. 1959(a)). The court of appeals explained that "[t]he 'maintaining or increasing' requirement is given its ordinary meaning and is satisfied if the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he

committed it in furtherance of that membership." Pet. App. 29a (internal quotations omitted).

Here, "the district court initially clearly instructed the jury that the government had to prove that [petitioners] committed the murders in order to maintain or increase their respective positions in the enterprise." Pet. App. 30a-31a (quoting instructions). The court of appeals explained, however, that toward the end of its instructions on the murder counts, and in instructing the jury on the murder conspiracy counts, the district court failed to "mention[] the maintaining-or-increasing-his-position motive and us[ed] instead the short-hand phrase 'in aid of racketeering.'" *Id.* at 31a; see also *id.* at 32a. While the court of appeals criticized such short-hand references (see *id.* at 31a, 33a, 35a), it explained that jury instructions must be viewed in complete context. *Id.* at 34a (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973)). It held that "even with the lapses, the instruction as a whole accurately charged the jury, especially considering that the court did properly impart the motive requirement numerous times and did give the jury the indictment, which also used the 'increase or maintain' language." Pet. App. 34a.

In any event, the court concluded that, because petitioners failed to object to that aspect of the charge at trial, reversal would be warranted only if they established plain error resulting in a miscarriage of justice. Pet. App. 34a-35a (citing Fed. R. Crim. P. 52(b) and case law under that rule). The court of appeals explained: "In light of the facts (a) that at the outset of its § 1959 instructions the district court properly instructed the jury as to the need to find a position-related motive, (b) that the jury was given a copy of the indictment, which correctly stated the motive requirement, (c) that the court advised the jury that it must determine whether or

not the government had proven the conspiracy 'as it is alleged in the indictment,' and (d) that there was overwhelming evidence in the record to support a finding of such a motive, we cannot conclude that the court's shorthand summaries resulted in such a miscarriage of justice." Pet. App. 35a; see also *id.* at 54a-56a (separate opinion concurring that instructions were not plain error).

d. The court of appeals held that the government sufficiently proved, and the jury was properly instructed regarding, Locascio's participation in the conspiracies. Pet. App. 38a-43a. The court recognized that "conspiracy law has required more than 'mere presence' or mere knowledge * * * [; r]ather, it is necessary for the government to introduce some evidence of participation in the conspiracy in order to sustain a conviction." *Id.* at 39a-40a (citations omitted). It determined that "Locascio * * * was not convicted for his mere presence" (*id.* at 40a):

> [T]he evidence viewed in the light most favorable to the government indicates that, as the "underboss," Locascio was present to help evaluate plans presented to Gotti and give advice as needed. Gotti, Locascio, and Gravano took extensive but ultimately unsuccessful precautions to ensure that their conversations in the Ravenite Apartment, the conversations constituting the bulk of the evidence against them, were not overheard. Considering the precautions taken to ensure security, and after hearing the tapes of what was discussed in that apartment, the jury was entitled to consider whether it was likely that Locascio would have been present during those conversations if he were not a participant. Although Locascio's mere presence would not be sufficient to

> sustain his conviction, the government did far more than establish mere presence.

Id. at 41a-42a.

The court of appeals also upheld the jury instruction on that point. Pet. App. 42a-43a. Rejecting Locascio's argument that the instruction improperly allowed conviction based on mere presence, the court of appeals deemed it "clear that the district court quite properly instructed the jury that presence under circumstances that advance the purposes of the conspiracy would be sufficient to support a finding of guilt." *Id.* at 43a.

ARGUMENT

1. Petitioners argue that the RICO jury instructions were deficient because they permitted the jury to find that the predicate acts of racketeering were related to the enterprise even if they "were committed exclusively for an individual's own purpose and not to further the goals of the [RICO] enterprise." 93-1400 Pet. 5. That argument lacks merit.[4]

RICO's "pattern of racketeering activity" element "requires that defendants commit at least two acts of racketeering that: (1) are related, and (2) amount to or pose a threat of continued criminal activity." Pet. App. 36a (citing *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989)). The court of appeals correctly

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[4] Petitioners characterize their claim as requiring resolution of the phrase in RICO "to conduct or participate, directly or indirectly, in the conduct of the affairs of an enterprise." 93-1400 Pet. 5. In fact, as the court of appeals correctly recognized, petitioners attacked the portion of the jury instruction that defined the "pattern of racketeering activity" element of RICO. Pet. App. 36a-37a. In any event, the instructions, read as a whole, clearly presented the issue to the jury that petitioners claim was erroneously omitted.

held "the relatedness requirement * * * satisfied by proof that: (1) the defendant was enabled to commit the offense solely by virtue of his position in the enterprise; or (2) the offense was related to the activities of the enterprise." Pet. App. 37a (citations omitted).

In addition to the "pattern" element, however, the district court instructed the jury regarding the distinct requirement that petitioners be shown to have "conducted or participated" in the conduct of the affairs of the enterprise. Pet. C.A. App. 1085, 1087-1088.[5] As to that element, the district court explained: "The terms conduct and participate in the affairs of an enterprise include the performance of acts, functions, duties, that are either necessary or helpful to the operation of that enterprise." *Id.* at 1087-1088. That instruction closely tracks the pattern jury instruction that petitioners contend (93-1400 Pet. 5-6) should have been given. See E. Devitt, C. Blackmar, and K. O'Malley, *Federal Jury Practice and Instructions* § 48.08, at 724 (1990) ("The term 'to conduct or participate, directly or indirectly, in the conduct of' the affairs of the enterprise means the performance of acts, functions, or duties which are necessary or helpful in the operation of the enterprise.").[6]

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[5] The court instructed the jury that the government must prove five separate RICO elements beyond a reasonable doubt: (1) that an "enterprise" existed, (2) that petitioners were "associated with or employed by" the enterprise, (3) that petitioners "conducted or participated" in the conduct of the affairs of the enterprise, (4) that they did so through a "pattern of racketeering activity," and (5) that the conduct of the enterprise affected "interstate commerce." Pet. C.A. App. 1084-1085, 1093.

[6] In *Reves* v. *Ernst & Young*, 113 S. Ct. 1163, 1173 (1993), this Court construed the phrase "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs" to require

The court of appeals' decision does not conflict with *United States* v. *Erwin*, 793 F.2d 656 (5th Cir.), cert. denied, 479 U.S. 991 (1986), the case on which petitioners principally rely. The *Erwin* court explained that "[r]acketeering activity alone does not violate RICO" but "[r]ather, the activity must further the affairs of the enterprise." 793 F.2d at 671. As support, it cited Fifth Circuit case law "finding [an] insufficient nexus to 'participation' unless (1) defendant has in fact committed the alleged racketeering acts; (2) his position in the enterprise facilitated his commission of those acts; and (3) the predicate acts had some effect on the enterprise." *Ibid.* (citing *United States* v. *Cauble*, 706 F.2d 1322, 1333 (5th Cir. 1983)); see also Fifth Circuit Pattern Jury Instruction No. 2.72, at 178 (1990) (requiring same three elements). The court of appeals' conclusion that "it is not determin[a]tive that the defendant committed the crime to further his own agenda, if indeed he was only able to commit the crime by virtue of his position within the enterprise" (Pet. App. 37a) is fully consistent with the Fifth Circuit' formulation. Proof that a defendant committed racketeering acts, facilitated by his position in the enterprise, expressly satisfies the first two Fifth Circuit elements and implicitly the third element as well.[7]

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an element of managing or operating the enterprise. Petitioners, however, did not request an instruction along those lines at trial, did not raise such a claim on appeal, and do not make that claim in this Court. In any event, the proof at trial established that petitioners were "in command of an extensive criminal enterprise," Pet. App. 5a, and there was no plain error in the instructions that would justify further review.

[7] The *Erwin* court recognized as much when it stated:

> The contours of a conspiracy may wholly overlap those of the enterprise. In that case, the racketeering activity of a

Finally, the jury instructions in no way precluded petitioners' "defense[] that the government's key witness, the turncoat Gravano, committed the series of predicate acts and substantive offenses charged in the indictment for his own purpose and not in furtherance of the affairs of the enterprise" (93-1400 Pet. 5). On the contrary, the district court required "proof beyond a reasonable doubt * * * that *the defendant you are considering* conducted or participated directly or indirectly in the affairs of the enterprise * * * through a pattern of racketeering activity." Pet. C.A. App. 1087-1088 (emphasis added). The government thus was required to prove petitioners' own conduct or participation in the enterprise through a pattern of racketeering; if in fact the jury found that the only racketeering acts were committed solely by Gravano for

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co-conspirator may well be sufficiently connected to the enterprise to violate RICO.

793 F.2d at 671. The problem in *Erwin*, not present here, was that the individual who committed certain racketeering activity was "not a member" of the alleged enterprise so the jury could not automatically "infer[]" a nexus between his racketeering activity and the affairs of the enterprise. *Ibid.* & n.24. While the court of appeals did not take issue with Gotti's assertion that some "other circuits require that the racketeering acts further the affairs of the enterprise, not just relate to the enterprise," Pet. App. 37a, *Erwin* is clearly distinguishable. Thus, the "conflict" claimed by petitioners (93-1400 Pet. 5) is more semantic than real. Petitioners' reliance (*id.* at 6) on *Bank of America* v. *Touche Ross & Co.*, 782 F.2d 966 (11th Cir. 1986), and *United States* v. *Truglio*, 731 F.2d 1123, 1132 (4th Cir.), cert. denied, 469 U.S. 862 (1984), is similarly misplaced. *Bank of America*'s essential approach was rejected by this Court in *Reves*, 113 S. Ct. at 1169, 1173. *Truglio*'s holding turned on the government's failure to establish predicate acts of racketeering. 731 F.2d at 1132 (finding insufficient evidence of Travel Act violations by a courier for a prostitution ring).

his own purposes, it could not have convicted petitioners. As the court of appeals noted in discussing petitioners' convictions under 18 U.S.C. 1959, "[t]he jury was free to accept Gotti's defense that the murders had been planned and committed only to further Gravano's interests, and simply rejected that theory." Pet. App. 35a.[8] Thus, even assuming there is some meaningful difference between the formulations of the Second and Fifth Circuits regarding an "in furtherance" requirement, this case would not be an appropriate vehicle for resolving it.

2. Petitioners next challenge the court of appeals' holding that the prosecutor's closing argument—alluding to the possibility that jurors might have safety concerns—was harmless error. 93-1400 Pet. 7-9. The court succinctly and persuasively explained why that remark, though improper, did not require reversal of petitioners' convictions. See Pet. App. 45a. In addition, after striking the remark, the district court "direct[ed] the jury to disregard" it. Pet. C.A. App. 1000. Reversing petitioners' convictions would therefore require departure from "the almost invariable assumption of the law that the jurors follow their instructions." *Richardson* v. *Marsh*, 481 U.S. 200, 206 (1987). In any event, the court of appeals' case-specific determination does not warrant further review. Cf. *United States* v. *Hasting*, 461 U.S. 499, 510 (1983) ("we are not required to review records to evaluate a harmless-error claim, and do so sparingly").

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[8] The murder of Louis DiBono exemplifies the overwhelming evidence that the racketeering acts were in furtherance of the enterprise. Although petitioners argued that the murder stemmed from Gravano's personal disputes with DiBono, Gotti was caught on tape telling Locascio: "You know why [DiBono's] dying? He's gonna die because he refused to come in when I called." Gov't C.A. Br. 21.

3. Petitioners also renew their challenge (93-1400 Pet. 9-12) to the district court's instructions regarding the statutory requirement, on the murder and murder conspiracy counts, that the murder have been committed "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity" (18 U.S.C. 1959(a)). The court of appeals explained that, while the district court initially instructed the jury completely on that requirement, its later instructions instead used "the short-hand phrase 'in aid of racketeering.'" Pet. App. 30a-31a. While the court of appeals criticized that short-hand (see *id.* at 31a, 33a, 35a), it found that the instructions were not plain error requiring reversal (*id.* at 35a).

The court of appeals properly applied a plain error standard of review applicable to claims not properly preserved in the district court. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 113 S. Ct. 1770, 1776-1779 (1993).[9] It thoroughly explained why petitioners could not satisfy the plain error standard on the facts of this case. See Pet. App. 35a. There is no basis for further review of that case-specific conclusion.

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[9] Petitioners take issue with any use of the plain error standard, and they rely on "a letter submitted to the district court * * * objecting to those portions of the court's charge which were 'different from or excludes or includes different language than the proposed requests to charge proffered by the [petitioners],' with specific reference to the § 1959 charges." 93-1400 Pet. 12 n.3. That generalized objection was not sufficient to preserve the specific challenge first raised on appeal. See Fed. R. Crim. P. 30 ("No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, *stating distinctly* the matter to which that party objects and the grounds of the objection.") (emphasis added).

4. Finally, petitioner Locascio challenges the sufficiency of the jury instructions and proof regarding his knowing and willful participation in the alleged conspiracies (93-1420 Pet. 10-23).

a. The instructions, which must be viewed in full context (*Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973)), thoroughly explained the need for proof beyond a reasonable doubt that Locascio knowingly and willfully participated in the alleged conspiracies. The district court instructed that the government must first prove that "[t]he conspiracy charged existed" (Pet. C.A. App. 1051), and that "[t]he second element which the Government must prove beyond a reasonable doubt is that the defendant knowingly and willfully became a member of the conspiracy" (*id.* at 1053). The court elaborated, as to that second element, that:

> Before you can find that a defendant was a member of the conspiracy, the evidence must show beyond a reasonable doubt the conspiracy was knowingly formed and that the defendant willfully participated in the unlawful plan, with the intent to advance [or] further some object or purpose of the conspiracy.
>
> I have already explained to you that an act is done "knowingly" if done voluntarily and intentionally, not because of some accident or mistake. I have already explained to you to act or participate "willfully" means to act voluntarily, intentionally, and with the specific intent to do something that the law forbids.
>
> * * * * *
>
> The mere fact that the defendant was present at meetings or was seen with one of the conspirators or

associated with him, was related to or had a friendship with one of them or worked with one of them, in and of itself is not enough to make a conspirator.

I want to caution you too, mere knowledge of or acquiescence without participation in the unlawful plan is not enough. What the law requires is that the defendant must have participated with knowledge of at least some of the purposes or objectives of the conspiracy, with the intent of aiding in the accomplishment of those unlawful objectives.

Before you can find the defendant was a member of the conspiracy, you would have to find that he intentionally, deliberately joined the conspiracy, participated in it, had a specific intent to do something that the law forbids.

Now, although mere presence or mere association with conspirators is not enough, it's a factor that you may consider among others to determine whether the defendant was a member of the conspiracy. The defendant's presence may establish his membership in a conspiracy, if all of the circumstances considered together show that his presence was meant to advance the goals of that conspiracy.

He must not only have been present, he must have known about the conspiracy, he must have intended by his presence to participate in the conspiracy or to help it succeed.

In other words, presence itself may demonstrate membership in a conspiracy only if that presence is a functional part of the conspiracy.

Id. at 1053-1055.

Locascio suggests that the phrasing of the final sentence could have obliterated the concededly "accepted definitions of conspiratorial liability" preceding it (93-1420 Pet. 10) and allowed the jury to convict "those who may serve a function in a conspiracy, although they have neither knowledge or an intent to further the scheme" (*id.* at 12). Locascio postulates that "the new 'functional presence' instruction would permit a jury to convict a watchman hired to guard a warehouse filled with contraband upon a finding that his presence was intended to and did further the plot involving the contraband, absent any finding that *the watchman* intended to participate and further the plot or even knew the contents of the warehouse" (*id.* at 12-13, emphasis in original). Those suggestions ignore the district court's repeated instructions requiring that "the defendant willfully participated in the unlawful plan, with the intent to advance [or] further[] some object or purpose of the conspiracy" (Pet. C.A. App. 1053), that "the defendant must have participated with knowledge of at least some of the purposes or objectives of the conspiracy, with the intent of aiding in the accomplishment of those unlawful objectives" (*id.* at 1054-1055), and that the defendant must have "intentionally, deliberately joined the conspiracy, participated in it, [and] had a specific intent to do something that the law forbids" (*id.* at 1055). There is no "reasonable likelihood that the jury understood the instructions" (*Victor* v. *Nebraska*, No. 92-8894 (Mar. 22, 1994), slip op. 3, citing *Estelle* v. *McGuire*, 112 S. Ct. 475, 482 n.4 (1991)) to allow conviction without proof beyond a reasonable doubt that Locascio knowingly and willfully participated in the conspiracies.

Locascio further errs in describing as "unprecedented" (93-1420 Pet. 10) the instruction that "mere" presence is insufficient but that "presence itself may

demonstrate membership in a conspiracy only if that presence is a functional part of the conspiracy" (Pet. C.A. App. 1055). As Locascio notes, that formulation originated with Second Circuit cases explaining that "presence itself will support a conspiracy conviction only if that presence is a functional part of the conspiracy." *United States* v. *Soto*, 716 F.2d 989, 992 (1983). And, in rejecting Locascio's challenge to the instruction, the district court expressly relied on Seventh Circuit case law to the same effect. See Gov't C.A. Br. 110 & n.100. The same concept has been expressed in different terms by other federal courts of appeals. For example, one court recently explained:

> The defendant's presence at a place where contraband is found may or may not be purely coincidental. The attendant circumstances tell the tale—and the culpability of a defendant's presence hinges upon whether the circumstances fairly imply participatory involvement. In other words, a defendant's "mere presence" argument will fail in situations where the "mere" is lacking.

United States v. *Echeverri*, 982 F.2d 675, 678 (1st Cir. 1993) (holding that the jury rationally could have found that "this was a case of culpable presence as opposed to mere presence").[10]

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[10] See also *United States* v. *Montoya-Ortiz*, 7 F.3d 1171, 1177 (5th Cir. 1993) ("presence is a significant factor to be considered within the context of the circumstances under which it occurs") (internal quotations omitted); *United States* v. *Gutierrez*, 978 F.2d 1463, 1469 (7th Cir. 1992) ("presence or a single act will suffice if the circumstances permit the inference that the presence or act was intended to advance the ends of the conspiracy") (internal quotations omitted); *United States* v. *Andrews*, 953 F.2d 1312, 1318 (11th Cir. 1992) ("We will thus uphold a conviction when the cir-

Locascio errs in claiming (93-1420 Pet. 15-17) that the decision in this case conflicts with other decisions holding that "mere presence" is insufficient to support a conspiracy conviction. As we have explained, the district court repeatedly instructed the jury to that effect (Pet. C.A. App. 1053-1055). Likewise, the court of appeals recognized that "conspiracy law has required more than 'mere presence' or mere knowledge" and it determined that petitioner "was not convicted for his mere presence" (Pet. App. 39a-40a).[11]

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cumstances surrounding a person's presence at the scene of conspiratorial activity are so obvious that knowledge of its character can fairly be attributed to him.") (internal quotation marks omitted).

Contrary to Locascio's suggestion (93-1420 Pet. 11-12), there is no reason the jury may not be informed of the legal distinction between "mere" presence and presence intended to serve a function of the conspiracy. That distinction is commonplace. In *United States* v. *Cochran*, 955 F.2d 1116, 1123 (7th Cir. 1992), for example, the court upheld a jury instruction that: "Presence or a single act will suffice if the circumstances permit the inference that the presence or act was intended to advance the conspiracy." Noting its prior "state[ments] on numerous occasions that the challenged sentence is an accurate reflection of the law," the court of appeals concluded that "[n]o error resulted from adding the sentence to the pattern jury instruction." *Ibid.* (citing cases).

[11] Locascio claims that the decision below conflicts with the requirement that all elements of a crime be proved beyond a reasonable doubt. 93-1420 Pet. 18 (citing *Sullivan* v. *Louisiana*, 113 S. Ct. 2078 (1993)). That claim rests on a mischaracterization of the court of appeals' opinion. The court of appeals recognized at the outset of its evidentiary review that "we will affirm the conviction if any jury could have found guilt *beyond a reasonable doubt* based on the reasonably drawn inferences from that evidence." Pet. App. 39a (emphasis added). In subsequently discussing the evidence of Locascio's knowing participation in the conspiracy, the court noted that "the jury was entitled to consider whether it was

b. There was ample evidentiary support for the jury verdicts finding petitioner guilty of knowingly and willfully having participated in the alleged conspiracies. See Gov't C.A. Br. 3-36, 137-148 (discussing evidence on each count). A reviewing court must, of course, "view[] the evidence in the light most favorable to the prosecution" and ask only whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979).

Here, the court of appeals correctly concluded that "as the 'underboss,' Locascio was present to help evaluate plans presented to Gotti and give advice as needed." Pet. App. at 41a; see, *e.g.*, Gov't C.A. Br. 138-139 (citing transcript of Gotti's statement to Locascio: "Am I lying, am I out of order here? Correct me! You're my. . . 'Underboss.' Correct me Frankie."). The court of appeals also stressed Locascio's and the others' "extensive but ultimately unsuccessful precautions to ensure that their conversations in the Ravenite Apartment, the conversations constituting the bulk of the evidence against them, were not overheard." Pet. App. 41a-42a; see, *e.g.*, Gov't C.A. Br. 5 & n.5 (discussing how, after climbing

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likely that Locascio would have been present during those conversations if he were not a participant." *Id.* at 42a. Contrary to Locascio's claim, that comment cannot fairly be read as accepting a lowered "likelihood" burden of proof; instead, it simply describes an inference jurors could draw to determine whether the government proved its case beyond a reasonable doubt. Other courts have used similar language in upholding jury verdicts. See, *e.g.*, *United States* v. *Brigham*, 977 F.2d 317, 319 (7th Cir. 1992) (in discussing permissible jury "inferences" regarding defendant's mere presence argument, court of appeals rhetorically asked: "Is Amos likely to come alone? Is a companion apt to be ignorant of the nature and risks of the transaction?").

two flights of stairs from Ravenite Social Club to apartment, petitioners took additional steps to prevent eavesdropping, such as suggesting that conspirators check outside door and turn up radio). Where an "underboss" repeatedly is present during conspiratorial discussions, and takes extensive steps to prevent them from being overheard, a rational jury is entitled to infer that the underboss is a knowing and willful participant in the conspiracies.[12]

c. Finally, there is no merit to Locascio's claim (93-1420 Pet. 20-23) that, as applied to this case, the RICO statute is unconstitutionally vague. Locascio's organized crime activities are at the very core of RICO, and thus that statute can scarcely have failed to give Locascio fair notice that his conduct was proscribed. See, *e.g.*, *United States* v. *Pungitore*, 910 F.2d 1084, 1104 (3d Cir. 1990) (RICO not vague as applied to activities of La Cosa Nostra), cert. denied, 111 S. Ct. 2010 (1991); *United States* v. *Angiulo*, 897 F.2d 1169, 1179-1180 (1st Cir.) (same), cert. denied, 498 U.S. 845 (1990). Locascio's vagueness claim depends on the premise that the court of

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[12] Cf. *United States* v. *Martinez-Moncivais*, 14 F.3d 1030, 1035 (5th Cir. 1994) ("When, as here, the defendant's presence is more than isolated or random and is considered along with the other evidence presented, we cannot say that the jury was irrational in finding Martinez guilty of knowing, voluntary participation in the narcotics conspiracy alleged in this indictment."); *United States* v. *Carson*, 9 F.3d 576, 587 (7th Cir. 1993) ("We recently held that the government can sustain a drug conspiracy conviction solely on evidence that the defendant engaged in counter-surveillance during a drug transaction. Such a holding does not obliterate the 'mere presence' rule, for we have long recognized that while presence alone is not enough to convict, [p]resence or a single act will suffice . . . if the circumstances permit the inference that the presence or act was intended to advance the ends of the conspiracy.") (citation omitted; internal quotation marks omitted).

appeals "rel[ied] simply upon evidence that proves only that [he] is a member of the charged enterprise, [without] additional proof he intended to commit the specific offenses alleged" (93-1420 Pet. 21). Because that premise fails, so too must Locascio's vagueness claim.

Locascio adds a footnoted argument (93-1420 Pet. 19 n.9) that the "broad theory of vicarious liability" was "particularly prejudicial" because of a "separate instructional error," namely the district court's failure to instruct the jury that evidence of Gravano's other bad acts was admitted solely as impeachment. The government's court of appeals brief thoroughly rebutted this argument (Gov't C.A. Br. 61-64) and it was one of the arguments summarily rejected by the court of appeals as "without merit and unworthy of further discussion" (Pet. App. 48a). Locascio has not properly raised that issue in this Court because it is not listed among his "questions presented for review" nor is it "fairly included" within any of the properly presented questions. See Sup. Ct. R. 14.1(a); *Kaisha* v. *U.S. Philips Corp.*, 114 S. Ct. 425 (1993) (per curiam).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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